FILED

DEC 27 1995

OFFICE OF THE CLERK

No. 95-879

IN THE
Supreme Court of the United States

October Term, 1995

DENNIS E. CARLSON,
Petitioner,

v.

HONEYWELL, and ICI AMERICAS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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87 pp

QUESTIONS PRESENTED

1. Whether the Appellate Court must review voidness of a Judgment where all defendants were dismissed and the appeal from the dismissal order was dismissed, requiring reversal.

2. Whether the judgment of March 3, 1993 for $147,000 in attorney fees is jurisdictionally void, requiring reversal.

3. Whether Fed.R.Civ.P. § 72(b) bars review on appeal of a magistrate's recommendation on Rule 11 sanctions, when a motion for rehearing was filed and reiterated within 10 days after a second, final, recommendation, for a monetary award, requiring reversal.

4. Whether a recommendation of a magistrate on Rule 11 sanctions, which was not complete, in that the sanction is not a part of the recommendation, an interlocutory recommendation which can only be appealed when a later recommendation is handed down with a monetary award which completes the sanction, require reversal.

5. Whether a verified denial, not based upon personal knowledge, vitiates a parties contradictory pre-filing admissions, requiring reversal.

6. Whether, arguendo, a statement allegedly made by counsel that he was not, at one time, able to prove a defendant liable, constitutes a clear admission that no facts existed that could support a verdict against that defendant, requiring reversal.

7. Whether movant failed to properly serve a notice with a transcript excerpt, due to concealment of the nature of the motion, requiring reversal.

8. Whether deposition excerpts filed by Honeywell raise an inference of defect and causation, requiring reversal.

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OPINIONS BELOW

1. The opinion of the Court of Appeals was published at 64 F. 3d 327(7th Cir 1995) and . It is reproduced and attached as Appendix A.

2. The opinions of Magistrate Judge Elaine Bucklo are published at 120 F.R.D. 681 (N.D. Ill. 1988) and 123 F.R.D 583 (N.D. Ill. 1988) and are reproduced and attached as Appendix B.

3. The orders of the District Court of July 13, 1989 and July 27, 1989, are reproduced and attached as Appendix C.

4. The opinion and orders of the District Court of December 12, 1990, are reproduced and attached as Appendix D.

5. The reports and recommendations of March 28, 1991 and July 10, 1992 are reproduced and attached as Appendix E.

6. The order of April 9, 1991 is reproduced and attached as Appendix F.

7. The District Courts opinion of October 17, 1991 is reproduced and attached as Appendix G.

8. The order of the District Court of October 7, 1992 is reproduced and attached as Appendix H.

9. The order of the District Court of March 3, 1993 is reproduced and attached as Appendix I.

10. The District Court order of March 25, 1994 and transcript of March 15, 1994 is reproduced and attached as Appendix J.

11. The District Court's orders of May 9, 1994 and June 20, 1994 are reproduced and attached as Appendix K.

JURISDICTION

The judgment of the Court of Appeals was originally entered on August 28, 1995.

A Timely Petition for Reconsideration and for Hearing en banc was made. That motion was denied and the judgment of the Court of Appeals entered on September 28, 1995. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. § 1254

CONSTITUTIONAL PROVISIONS

"No person shall be ... deprived of life, liberty, or property without due process of law ..." (U.S. Const., Article V)

STATEMENT OF THE CASE

Petitioner was sole counsel for Kristina Lorentzen and her husband Alan who sued several defendants for Kristina's toxic condition alleged to have been caused by ingestion by contact or inhalation of poisons routinely applied in the elementary school where she taught and her condition became apparent and for additional ingestion at a school to which she was transferred within her employer's school district.

Kristina alleged that the first school was constructed in a manner that sealed the inside of it from the general external atmosphere; that pesticidal poisons, including but not limited to ICI Americas' rat poison known as ICI's Talon G, were released or over time degraded and emitted poison into the school's internal closed atmosphere.

She further alleged that the master control for the atmospheric internal environment in the school had been manufactured and installed according to requirements of defendant Honeywell; the Honeywell control never properly operated to cause ducts, fans and vents of the heating, ventilation and air conditioning system and other system components to sufficiently and properly move, clean or vent

the internal atmosphere of the school in which she was required to work; and that the routinely applied poisons released or emitted increased and remained within the school causing toxic contamination of the atmosphere and chemical death of cells in various systems of her body to a sufficient extent to cause her pain, suffering and disability.

The contract applicator, Anderson Pest Control, Inc., disclosed in response to a pre-filing inquiry that Talon G was one of several identified poisons available to technicians for use at school district premises of Kristina Lorentzen's employer including the elementary school alleged to be contaminated in which suffering and disability first became apparent to her, but plaintiff's employer which had obtained this information later refused to disclose any information after the disclosure of pesticides made available by Anderson for applications at schools by its technicians.

In response to defendant ICI America's Request for Admissions of codefendant Anderson Pest Control, Anderson denied that Talon G, which had been represented to have been available for routine use in plaintiff's employer's schools, had been used in those schools and supported with the explanation that although available at the plaintiff's employer's suburban schools for use rat poisons were not used because of an unwritten Andersen policy for school pesticidal use.

Honeywell answered the plaintiffs' complaint in law and discovery by admitting that it believed that it supplied heating, ventilating and air conditioning [HVAC] component controls but could not find its documents for its contribution to the construction of the school where plaintiff's suffering became apparent to her. Extensive discovery was pursued by

defendants beyond the geographical jurisdiction of the assigned magistrate judge and district court judge prior to, during and after the denials of Anderson and Honeywell's claims of lack of documentation for its contribution to school construction.

Honeywell filed a lengthy transcript from one of seven sessions of plaintiff's deposition taken in two states concerning her health before, at the time of and after she worked in school premises complained of without serving a copy of it on petitioner and without serving a notice that identified the excerpt as having been submitted to Magistrate Judge Elaine Bucklo.

No affidavits other than that of Anderson's president were filed, and no other deposition testimony was submitted or filed in support of or in opposition to motions of ICI which had requested findings of violation of Rule 11 but not any particular fee, cost or other sanction for the claimed violations. Magistrate Judge Bucklo's first Report and Recommendation findings of Rule 11 violation recites a reliance on Kristina's testimony that she had no knowledge of a particular HVAC component that contributed to cause her poisoned condition.

Petitioner and plaintiffs were not given notice of what was before the magistrate for her consideration for a report and recommendation. Petitioner therefore did not factually oppose what appeared to be factually unsupported motions for findings of lack of basis in fact for the allegations in the complaint. Pre-filing information obtained by investigations of persons available to a restricted degree to plaintiff Kristina Lorentzen and unavailable to petitioner after inquiry by Kristina was rejected or ignored.

Petitioner contends that Rule 72(b) of the Fed.R.Civ.P. does not require the filing of an objection to a recommendation for entry of a non dispositive order and that, therefore, the merits of the basis for claims against Honeywell and ICI had to be considered and the motion for reconsideration should have been granted. Further, the District Court had no jurisdiction 10, 30 or 90 days after the dismissal of the entire lawsuit on December 13, 1990.

It lacked jurisdiction, therefore to adopt any report and recommendation and had no jurisdiction on March 3, 1993 nor thereafter.

The Appellate Court, therefore, did not have jurisdiction to do anything other than to declare the judgment of March 3, 1993 void for lack of jurisdiction in the U.S. District Court on that date.

Further, had the magistrate, trial judge and appellate court considered the merits of the claims made against ICI and Americas, they would have been denied for lack of evidentiary facts to support the claims made.

REASONS FOR GRANTING THE WRIT

In the record below, Honeywell Exhibit In Support Of Motion For Sanctions And Memorandum of Law in Support contains no notice of filing or certification of service on plaintiffs' counsel in the record although the docket sheet shows a notice of filing at about that time.

Kristina K. Lorentzen's deposition transcripts exceed 2,000 pages in length. A minute portion of this entire deposition

was relied on by the magistrate for attorney violative conduct to the exclusion of the rest.

Plaintiff Kristina testified that doctors Crayton and Randolph had determined that she was reactive to several petrochemical compounds including natural gas, and that the wholly enclosed Neubert school internal environment where she taught school was likely to contribute to cause symptoms that she had been experiencing. Many symptoms she had begun experiencing at that school were associated with her presence at that school and then at Dundee Highland school in Unit School District 300 in Illinois in 1986 and 1987.

She related her symptoms and condition of illness together with the complaints of her fellow teachers with stale air, overly hot temperatures, entrance and exit doors to the Neubert school building which were kept propped to get fresh air and open because of the stale air in the school, reports by school administrative persons and janitors about malfunctions of the HVAC system, that a heat sensor had been installed backwards, that filters were required to be changed, that the system did not work properly, and that Tessendorf had been repeatedly on the premises to repair the system, without apparent success..

Teachers had no controls for their individual rooms; there was no air movement; and a person in the heating business advised her that the industry sometimes recirculated warm air rather than bring in new cold air in the winter because it is cheaper to heat the building that way. The west end of the school did not ventilate, heat or cool properly; and the system had never worked since installed. She had been told by one of the school employees that Honeywell was a construction contractor and had installed the HVAC system.

Further there was a design flaw in the ventilating system and a school maintenance person or janitor Jensen told her that a heat sensor did not allow for change of air.

She also testified that she had been informed when inquiring that Honeywell was a construction contractor and that she had been given no information to the contrary. Jensen told her that a heat sensor had not been properly placed for six years.

The magistrate's first Report and Recommendation in which she recommended that a finding of a violation of Rule 11 be entered and related that dismissal occurred shortly after plaintiff was deposed and that ICI was named because records showed that Honeywell was not involved. The records submitted show that it was a $50,000.00 plus contractor for the HVAC system's controls.

The first report states that appellant listed every chemical that could have caused symptoms and waited to find out from discovery what one's were used. Plaintiff had inquired of the school which had inquired of Anderson. The disclosure was for chemicals available for use, and then the school refused further information. Anderson's Steve Kuhse states in part in his March 23, 1986 letter to plaintiff's employer that enclosed were "sample labels of Pesticides available to the Anderson technician."

Those pleadings include both petitions for sanctions and various pleadings responsive thereto by appellant. More specifically the petitions of defendants for sanctions are as follows:

Appellant's filed pleadings described for mootness:

March 22, 1991, MOTION by plaintiff for a more definite statement, [Entry date March 26, 1991], March 22, 1991, MOTION by plaintiff for evidentiary hearing. [Entry date March 26, 1991], March 22, 1991, MOTION by plaintiff to dismiss sanction request, [Entry date March 26, 1991].

Two of the four pleadings of plaintiffs filed by appellant pertain to a petition for a fee sanction denied by Judge Lindberg from which no appeal was taken.

Honeywell's stipulation and its dismissal were by negotiated settlement. Plaintiffs agreed to drop all claims. Honeywell dropped reservations of rights. Two stipulations were submitted by its attorneys. The first reserved to Honeywell is the right to proceed for sanctions or other relief under either state or federal law. The second, without reservation, was fully executed and filed by Honeywell.

Appellant argued below that the rights of the parties existing at the time of the agreed settlement merged in the settlement and dismissal by stipulation entered without objection by any party pursuant to Fed.R.Civ.P. 41(a)(2).

Likewise is the dismissal of ICI. That stipulation is appended. It contains an exchange of consideration. [Executed July 14, 1989.] Argued was that no reservation of rights is stated in this settlement stipulation.

Plaintiffs filed two successive lawsuits against the same defendants. In each attached to filed complaints and/or incorporated therein are documents from Kristina Lorentzen's employer which included Anderson Pest Control disclosures

of other defendants' pesticide products available for its use at the employer schools which had been obtained prior to filing the first lawsuit. In Magistrate Bucklo's Report and Recommendation the documentation is described.

HONEYWELL, INC.

Honeywell's motion to strike and dismiss Counts III and IV of the complaint in 88 C 7142 {2nd suit} pursuant to Fed.R.Civ.P. 10(b) {Because duplicative.} and in the alternative pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss Count IV {For failure to state a cause of action for product liability} was docketed on September 29, 1988. Honeywell also filed an answer and affirmative defenses to Counts I and II at the same time. Admitted is the following allegation:

> "The defendant, Honeywell Incorporated, designed [and] provided components [for] and the defendant, Tessendorf Mechanical, installed said components and provided and designed the remaining components of and maintained the heating and ventilating system at said Neubert school at the time mentioned here and or when it was constructed prior to August 26, 1985."

The plaintiffs' amended complaint in the second lawsuit was filed on February 16, 1989. Honeywell filed its answer to the amended complaint on March 17, 1989, and admitted as to paragraphs three of count one of that complaint that "it had designed and provided some components for the heating and ventilating system at Neubert School." Paragraph three of count one states as follows:

> "The defendant, Honeywell Incorporated, designed and provided components and the defendant Tessendorf Mechanical installed said components and provided and designed the remaining components of and maintained the heating and ventilating system at said Neubert School at the times mentioned herein or when it was constructed prior to August 26, 1985, but said system did not work and did not vent the internal environment in said school as intended, designed and required for the safe occupancy of said school under circumstances of use which were reasonably foreseeable."

Affirmatively alleged by Honeywell is the following:

> "HONEYWELL complied with and was justified in relying upon the plans and specifications provided and approved by the State of Illinois concerning heating, ventilating and air conditioning systems. The state specifications relied on by HONEYWELL were not so apparently defective that HONEYWELL had notice that the work was dangerous and likely to cause injury. Therefore, because HONEYWELL fully complied with said plans and specifications, HONEYWELL should not be found liable to these plaintiffs."

Honeywell's answer and affirmative defense to this complaint was executed under oath by attorney Geoffrey A.

Bryce of Rooks, Pitts and Poust on March 17, 1989. The answer specifically alleges that the corporate defendant lacks knowledge sufficient to admit or deny allegations and that such statements are true and correct. The last affirmative defense alleges that Honeywell did provide work..

Honeywell was served on February 7, 1989, its answer interrogatory three are as follows:

> QUESTION: Did defendant or any other person or entity to defendant's knowledge enter into any written or oral agreements with respect to the occurrence . . .
>
> ANSWER: "Defendant Honeywell objects to Interrogatory NO. 3 on the ground that as applied to defendant Honeywell "occurrence" is vague and ambiguous. Defendant Honeywell cannot locate all of its files concerning the school located west of Route 31 on Hunting Drive, Algonquin, Illinois. It is believed that the records were destroyed pursuant to a company wide records retention policy. According to the normal procedure for Honeywell, it is believed that Honeywell may have contracted with Illinois Heating & Ventilating Co., Inc. to furnish certain components and incidental installation per the plans and specifications prepared by K.C. & M. Engineers & Associates, Inc. and Scheidematel & Trietler, Ltd. Architects. Otherwise answering, none known at this time.

On July 13, 1989, the court ordered that "Plaintiffs' oral motion to dismiss Honeywell is granted."

On September 8, 1989, Honeywell's Motion for Sanctions Pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § 1927 was filed, consisting of two pages, four numbered paragraphs and a wherefore clause (Page 2) requesting that there be (i) a finding of violation of Rule 11 and Section 1927; (ii) "reasonable attorneys' fees and costs in connection with its defense in Lorentzen I and in this case, including fees and costs incurred in preparing this motion and memorandum"; (iii) leave to file an itemized petition for fees and costs within 28 days, and (iv) "other relief as this Court finds just and reasonable relief".

ICI AMERICAS, INC.

A Stipulation to Dismiss was, executed by appellant on July 14, 1989 and returned to ICI Americas. It was docketed by the clerk of the district court on July 28, 89 with ICI's Motion to Enter Stipulation to Dismiss, also docketed on the 27th.

Pursuant to certification of service executed by Alan R. Dolinko of Sidley and Austin, counsel for ICI, the Motion to Enter Stipulation was served on all counsel of record on July 19, 1989.

On July 27, 1989, the court recited that pursuant to (a) motion of ICI Americas, Inc. and (b) Motion to Enter Stipulation to Dismiss, it is ordered that "Pursuant to stipulation, defendant ICI Americas Inc. is dismissed, with prejudice, pursuant to Rule 41(a)(2). The related Motion to

Enter Stipulation to Dismiss (291), also filed July 27, 1989, of ICI, moves pursuant to Fed.R.Civ.P. 41(a)(2) for an order of court dismissing it from the lawsuit with prejudice in accordance with the parties' stipulation to dismiss which is attached hereto.

On August 10, 1989, ICI Americas, Inc. filed its Motion for Rule 54(b) Finding, mailed August 3, 1989 and a minute order for judgment was entered that day reciting that a dismissal had been entered on July 27, 1989, with prejudice and by agreement pursuant to Rule 41(a)(1) [Actually per Rule 41(a)(2) according to prior order & stipulation.] and that "[the prior] order being a final judgment of dismissal in favor of the defendant, defendant's motion for entry of judgment pursuant to Rule 54(b) is granted.".

On August 10, 1989, the clerk entered another order which stated as follows:

> IT IS ORDERED AND ADJUDGED that plaintiff having dismissed defendant ICI Americas, Inc. on July 27, 1989, with prejudice and by agreement, pursuant to Rule 41(a)(1) and that order being a final judgment of dismissal in favor of the defendant, final judgment pursuant to Rule 54(b) is hereby entered. Enter judgment.

ICI Americas filed on November 2, 1989 its 3.5 page Motion for Sanctions pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § 1927 against attorney Carlson only and 15 page Memorandum reciting unverified purported fact in support.

Vol. 9 of 38 contains pages 1596 through 1895 from a two thousand page deposition of the plaintiff taken in three sessions and two states that contains a face sheet with the caption of the case entitled, HONEYWELL EXHIBIT IN SUPPORT OF MOTION FOR SANCTIONS AND MEMORANDUM OF LAW IN SUPPORT filed September 7, 1889 and docketed September 8, 1989. It is unclear whether it was made available to, reviewed by or relied on by the magistrate or not.

Plaintiffs filed four transcripts and two affidavits in opposition to defendants' motions for sanctions. Appellant's petition for Rule 11 sanctions filed on April 14, 1994 for misrepresentations by defendants included exhibits A through O consisting in part of the docketing statement designating the mooted sanction motions or petitions and also documents detailing Honeywell's involvement in the HVAC system in exhibits L through O summarized as follows:

L - O: Honeywell contractor waivers to Illinois Heating and Ventilating Co. for plaintiff's school building from 1978 through 1981, letters Honeywell to School District 300 for unpaid balances such as $16,943.00 on a contract price of $50,000.00 to $56,000.00 for the subject school and Honeywell schematics for HVAC controllers, sensors, monitors and fittings with related information. See Petition for Rule 11 sanctions for Misrepresentation of Fact on and before March 15, 1994 at page 11 and in foot note one on p. 11. This pursuant to subpoena referred to by Magistrate' Bucklo's R. & R. as having disclosed lack of Honeywell involvement. Not made available to her, i.e., no transcripts or documents having been served on appellant nor described by notice of defendants as having been filed in support of petitions for sanctions against appellant.

On October 17, 1991, the presiding District Court Judge adopted Magistrate Bucklo's report and recommendation of March 28, 1991, which recommended that defendants' motions for sanctions against attorney Carlson be granted, but which failed to specify the sanction, and thus was not a final recommendation.

On November 22, 1991 ICI filed its Notice of Filing and two page Petition for Costs and Fees which adopts the affidavit of attorney Beyer which in turn attaches a statement of fees comprised of a series of abbreviated two to six word references to work done from February 5, 1988 through February 21, 1991 and cost entries for messenger services, Fed Exp. duplicating, bindery work not described and reporter costs.

I.

IMPORTANCE OF RESOLVING SANCTION MOTIONS ON MERIT OR LACK THEREOF

It is of paramount concern that constitutionally conferred limited jurisdiction in federal courts is not exceeded.

It is of great importance that the doors of the courthouse are not closed to litigants by sanctioning attorneys for attempting to prosecute suits for substantial injury that are difficult, complex and which ultimately exhaust the economic resources of clients and counsel for prosecution of otherwise viable claims.

It is improper for the court to speculate on the reason for dismissal, when there is no factual basis in the record.

A primary public policy of state and federal government is the protection of life and property. Access to the courts should not be barred for pesticide contamination in elementary schools that cause delayed disability and loss of a normal life for generations of susceptible individuals routinely poisoned.

The heavy burden on courts and all litigants arising from unseeable chemical cellular destruction of organs and systems of the body from post 1940 use of fabricated hydrocarbon poison compounds, must not be laid at the feet of the bearer of such litigation because the litigants and their counsel staggered from exhaustion under burden of discovery required of them by multinational corporations.

No agency or fund exists to toxic personal injury claims. The traditional attorney's contingent fee is ordinarily an inadequate fund to finance toxic tort personal injury claims as demonstrated by the record below.

II.
THE TRIAL COURT WAS WITHOUT JURISDICTION TO ENTER A JUDGMENT

The appellate opinion herein conflicts with jurisdictional requirements articulated in *Spring Garden Associates v. Resolution Trust Corp.,* (3rd Cir. 1994), 26 F.2d 412, 415; *Employers Ins. of Wausau v. Crown Cork & Seal Co., Inc.*, (3rd Cir. 1990), 905 F.2d 42, 45; *Stearnes v. Bauer's Opera House, Inc.*, (7th Cir. 11/1993), 3 F.3d 1142 {at bottom of p. 40 of appellant's original brief}; *Maxus Energy Corp. & Subsids. v. U.S.*, (1994), 31 F.3d 1135; *Clark Equipment v. Lift Parts Mfg. Co. Inc.*, (7th Cir. 1992), 972 F. 2d 817; *Cipollone v. Ligget Group, Inc.*, ____ U.S. ____, 112 S.Ct.

2608, 2620, 120 L. Ed.2d 407 (1992). There is a denial of due process guaranteed to all, including attorneys, by the 14th Amendment to the U.S. Constitution.

Every federal appellate court has a special required obligation to satisfy itself not only of its own jurisdiction, but also that of lower courts in the cause under review. *Spring Garden Associates v. Resolution Trust Corp.*, (3rd Cir. 1994), 26 F.2d 412, 415; *Employers Ins. of Wausau v. Crown Cork & Seal Co., Inc.*, (3rd Cir. 1990), 905 F.2d 42, 45; *Stearnes v. Bauer's Opera House, Inc.*, (7th Cir. 11/1993), 3 F.3d 1142 {at bottom of p. 40 of appellant's original brief}; *Maxus Energy Corp. & Subsids. v. U.S.*, (1994), 31 F.3d 1135. This duty is violated.

Jurisdictional mootness arose when the stipulations to dismiss were filed in 1989, *Clark Equipment v. Lift Parts Mfg. Co. Inc.*, (7th Cir. 1992), 972 F. 2d 817. Also see *Cipollone v. Ligget Group, Inc.*, ____ U.S. ____, 112 S.Ct. 2608, 2620, 120 L. Ed.2d 407 (1992), cited and relied on by the court in Clark (See brief at point five) Federal courts lack jurisdiction to consider the merits of claims that are deemed moot because judicial power extends only to cases or controversies. *Tucson Medical Center v. Sullivan*, (C.A.), 947 F.2d 971, 977; *United States v. Munsingwear*, 340 U.S. 36, 30, 71 S.Ct. 104, 106, 95 L.Ed. 36.

Jurisdiction expired shortly after if not before the underlying lawsuit was dismissed in its entirety for failure of ICI and Honeywell to file a complete or supplemental Rule 11 petition by requesting a specific fee sanction before or after Judge Lindberg warned that Rule 11 sanctions sought needed to be jurisdictionally perfected.

Loss of jurisdiction was spread of record pursuant to the October 7, 1992, explicit and specific designation and declaration of mootness of the fee petitions of defendants. No appeal from that jurisdictional declaration has ever been taken by defendants no doubt because this court held in *Brainerd v. Beal,* 498 F. 2d 901 (7th Cir., 1975), that a notice of appeal was jurisdictionally void because filed one day late. In accord is *Needham v. White Laboratories, Inc.*, (7th Cir. 1981), 639 F.2d 394, 397. Ignoring the October 7, 1992 declaration of lack of jurisdiction over fee petitions does not, according to any logic or authority, revest jurisdiction for entry of a judgment in March of 1993.

This court held that a motion for reconsideration of a fee award operates as a Rule 59(e) motion to postpone running of the time to appeal. *Lenard v. Argento*, (7th Cir. 1983), 699 F.2d 874, cert. denied, 464 U.S. 815. Not only was there no notice of appeal filed from the October 7, 1992 order, but there also was no motion to reconsider the October 7, 1992 declared mootness. Nor was there a motion to open the December 13, 1990 dismissal of the entire lawsuit.

Neither the court of appeals nor a cooperative opponent can revive an appeal when notice of appeals was not timely filed. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 74 L.Ed.2d 225 (1982); *Lindsey v. Perini*, (6th Cir. 1969), 409 F.2d 1341; *First National Bank of Salem, Ohio v. Hirsch*, (6th Cir. 1976), 535 F.2d 343, 345, n. 1. In the instant cause the defendants did not even take an appeal nor move for retention of jurisdiction over the motions which failed to contain a request for a fee sanction and which, therefore, were not even sufficient Rule 11 fee sanction requests.

The October 7, 1992 mootness order passed on the only claims not yet explicitly ruled on as of that date, and no appeal has ever been taken from that order to date. Therefore, the fee award is void as the confirmation of that judgment by the court of appeals is also void.

As a matter of practicality the October 7, 1992 order was final. *Eisen v. Carlisle & Jacquelin*, (1974) 417 U.S. 156, 40 L.Ed.2d 732 . The mootness declaration of October 7 left the court with nothing more to do except to enforce its judgment of mootness. *Catlin v. Unites States*, (1945) 324 U.S. 229, 89 L.Ed. 911, 916; *Parr v. Unites States,* (1956) 351 U.S. 513, 100 L.Ed. 1377. The district court and this court have failed to enforce the October 7, 1992 judgment.

In *Textile Banking Co., Inc.*, (7th Cir. 1981), 657 F.2d 844, the court held that it did not have jurisdiction to review a default judgment order entered in supplementary proceedings to satisfy a judgment where late notice of appeal was not timely filed, notwithstanding interim efforts to persuade the district court to vacate a judgment. In the instant cause the defendants wrote an interim letter to the court to cause it to award a $147,000.00 judgment about five months after entry of the October 7, 1992 jurisdictional mootness order. A letter ignoring that judgment order cannot confer jurisdiction nor jurisdiction be restored by ignoring below and on appeal the October 7, 1992 ruling.

The reviewing Court ignored that the motions were not, jurisdictionally timely filed; that the supplemental fee specific fees claimed were not filed until many months after the underlying lawsuit was dismissed in 1991 as to all defendants remaining after the July 1989 stipulated dismissals; that approximately one half year elapsed before judgments were

entered in March of 1994, and jurisdictionally barred petitions were declared on October 7, 1992, by Judge Lindberg, to be "moot" for which a docketing statement cites by docket numbers for both 92 fee petitions and every related responsive pleading.

III.

Fed.R.Civ.P. #72(b) DID NOT APPLY TO THE FIRST REPORT AND RECOMMENDATION FOR A NON DISPOSITIVE FINDING

Point one: Rule 41(a)(2) did not preserve jurisdiction for the filing of a Rule 11 motion or petition, and neither subsection (a) nor (b) applied to the first recommendation and report of the magistrate.

Fed.R.Civ.P. 72(b) does not require an appeal from a report and recommendation which is interlocutory. Since the first report and recommendation was not final, multiple appeals would result. On appeal the court erroneously found that an objection was jurisdictionally necessary to appeal the magistrate's first report and recommendation for a finding of a violation of Rule 11.

The court erred in holding that there was no objection to a report and recommendation for sanctions because a timely objection was filed upon a final report The Court of Appeals ignored the fact that appellant's pleading filed within 10 days of the first report states that "if the motion (to reconsider) is denied, plaintiffs object to the declared violation of Rule 11 violation.

Cameau v. Rupp, (D. Kan. 1992), 142 F.R.D. 683, which holds that a motion to vacate, such as petitioner filed, obviates the need to object within 10 days to a magistrate's ruling. In *Lenard v. Argentino* (7th Cir.), 600 F.2d 874, 898. a motion to reconsider made within a ten day time limit extended the time within which to file a notice of appeal. The lack of an appropriate title for a pleading which timely attacks a magistrate's report and recommendation is not fatal to jurisdiction. Courts are charged with considering substance over form. It is clear that an objection was timely filed.

Had the motion been entitled objection and motion for reconsideration for stated reasons, the court would have taken an opposite position, as there is nothing in the law that says that a pleading cannot serve more than one function or purpose.

In sum, the opinion of August 28, 1995 affirms a judgment for $147,000.00 without a word about whether or not the jurisdictional issue raised by appellant below and on appeal had merit. That issue must be addressed whether properly and sufficiently raised or not by appellant. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir.), cert. denied, 434 U.S. 975.

Similarly, the trial court gave no explanation for its bald conclusion that it had jurisdiction to enter judgment in March of 1993 on petitions it had declared moot in 1992.

Point Two: Defendants were not compelled by plaintiffs or petitioner to submit to "needless discovery" where they in fact set the discovery priorities and schedules they desired with the magistrate's approval.

The court of appeals opinion is factually in error in stating that Honeywell and ICI were compelled to participate in discovery for two years before respectively dismissed.

Sanction was entered in the trial court for the declared failure of petitioner to perform a reasonable pre-filing investigation. Sanctions were affirmed for what this court characterized as needlessly requiring defendants to submit to discovery.

The needless discovery conclusion is drawn from an uncritical reading of paragraph seven of ICI's three page incomplete October 16, 1989 motion for sanctions which falsely states it "spent two years defending against this factually baseless lawsuit."

No defendant appeared in the first of two lawsuits filed except to contest service by mail pursuant to Fed.R.Civ.P. 4j.

The second suit was filed on August 17, 1988. ICI filed an answer to the complaint on September 7, 1988. Honeywell filed on the same date. ICI denied knowledge sufficient to form a belief as to the truth of the allegations made against it and concluded therein that it was without fault or liability. Likewise Honeywell denied sufficient knowledge but admitted that it had designed and provided components for the hearing and ventilating system at Neubert, a fact that its attorney argued in hearings on post judgment motions and on appeal was not true.

The Anderson affidavit, referenced in the District Court opinion at page three, is apparently that of corporate officer Thomas O'Hara. It was executed on March 13, 1989, about six months after defendant ICI appeared.

The corporate officer's affidavit contains 8 brief paragraphs. At paragraph 8 O'Hara concludes based on his "knowledge" of "record keeping practices" and a review of "those records" that Anderson Pest Control did not use, apply or place Talon-G into Neubert Elementary School between August 85 and May 87.

Steven Kuhse's affidavit, Anderson's Manager, executed on August 10, 1989, about one month after dismissal of ICI, states that when he disclosed Talon-G in response to plaintiffs' pre-filing inquiry for the identity of pesticides used, he did not know what products were used but only intended to disclose which ones were available for use by applicators rather than which ones were used as requested by plaintiffs.

Defendant Honeywell and ICI were dismissed in mid July of 1989. On July 13, 1989, Honeywell was dismissed on oral motion pursuant to an agreement and an executed stipulation from which a reservation of claims for sanctions had been stricken by agreement. The stipulation was executed on July 14, 1989. The stipulation to dismiss ICI was executed on July 14, 1989, and it was later filed by ICI on July 20, 1989, at its leisure.

The District Court's opinion that petitioner put ICI through needless discovery compliance is tantamount to holding as a matter of law that a codefendant's corporate officer's self serving affidavit based on fragmented slips of paper by various applicators not specifically identified and of unknown nature and competency is peremptory on the issue of what products applicators used in fact. Accordingly, this court's ruling would require that plaintiffs and their attorney forego cross examining the affiants regarding the reliability of their reported conclusions, the bases for same and the various

applicators. This, petitioner contends, is not a result reasonable requirement since it is tantamount to allowing defendants to be summarily dismissed on the affidavit of a codefendant that the dismissed defendant was not involved but merely available for involvement. Criminal defendants would welcome such a procedure to avoid conviction for crimes perpetrated if a cooperative codefendant is available.

Honeywell in fact provided the master controls for the HVAC system, a fact irrefutably proved by more than $57,000.00 in contract documents for the Neubert Elementary School which Honeywell spuriously and falsely claims is a school that either does not exist or which it did not work on contrary to its answer.

Petitioner asked for and was refused an evidentiary hearing although the magistrate's report is based on her presumption that dismissal that followed production of school records is evidence of the lack of Honeywell involvement although in fact the cpposite is true. The dismissal was for lack of financial means and resources to prove a strict liability defect under Illinois law which, does not mean that the HVAC Honeywell controls were not malfunctioning at all times mentioned as supported by the personal experiences of the plaintiff and other teachers in the building during hot and cold seasons.

The magistrate did not set a briefing schedule for resolution of the Honeywell motion for a recommendation of a declaration of a Rule 11 violation notwithstanding assertions to the contrary by defendants. The docketing sheet shows no briefing schedule or hearing date.

Adding to confusion, Honeywell submitted under a cover pleading erroneously labeled a memorandum a copious excerpt from the plaintiff's deposition in which this teacher admitted lack of engineering or legal expertise. Since no transcript excerpt was served on petitioner, no other excerpts or affidavits in opposition were submitted.

For the lack of an English teacher's expert opinion, the magistrate concluded that there was no Honeywell involvement. This notwithstanding that plaintiff testified in deposition to her personal knowledge that the HVAC system in her experience did not cool, heat nor move fresh air. Honeywell control components regulated the Neubert Elementary School entire HVAC system and that Honeywell stated it had not known the extent of its involvement when filing answers to interrogatories although opining that it had likely submitted components for the system. These matters were all addressed in petitioner's briefs and ignored on appeal.

Point Three: The statement that the magistrate supervised and knew, therefore, the content of discovery is inherently contradictory because supervision does not amount to review of any transcript of any deposition from amongst more than 40 sessions that occurred.

According to the record she only read the transcript for the deposition of one Anderson Pest Control applicator and there concluded that defense counsel violated rules of discovery by interfering with the interrogation of petitioner of the deponent. This court's reliance on supervision of discovery by a magistrate who attended no session of plaintiff's deposition is mere sand upon which to base a judgment for

$147,000.00. No dispositive motion on the merits was noticed for hearing nor ruled upon.

The appellate court opinion herein does not address any of the points raised by petitioner's brief, does not explain why it was not necessary for defendants' to show as a basis for sanction that plaintiffs could never have proved claims made against them, that mootness does not apply, that jurisdiction was not lost by the filing of stipulations in 1989 nor the late 1991 dismissal of all defendants not already dismissed nor by the October 7, 1992 order declaring all pending matters moot where the only matters not specifically resolved were the two 1992 fee petitions.

IV.

PETITIONER'S FEE SANCTION MOTION

The court of appeals concluded that the claims for fee sanction awards for false statements of fact were waived by failure to move for hearing and that this failure was not excused by the failure of the district court's reporter to transcribe the record for appeal for that portion of the record wherein the misrepresentations were stated. Where the only matters on appeal related to frivolous pleadings and sanctions, this court insists that at petitioner's peril he was required to raise for hearing a motion for sanctions without the necessary underlying transcript for a judge who repeatedly refused to hear matters unless related transcripts of proceeding were provided.

Petitioner was also at peril if he moved for hearing on his motion for sanctions without a transcript and was damned for not having waited for it before asking for a ruling from Judge

Lindberg. The failure or refusal of the court's reporter to provide a transcript in any period of time that could be loosely characterized as less than unreasonably tardy was the death knell for petitioner's cross motion for sanctions.

Appellant's motion for sanctions was stricken sua sponte without a hearing at the very time that the record pertaining to the hearing in which misrepresentation of fact and law were made that are complained of in the sanction motion inexplicably remained un-transcribed by the official court reporter assigned to Judge Lindberg notwithstanding several orders and motions on appeal pertaining to the failure to transcribe those proceedings.

V.

THERE IS INSUFFICIENT PROOF TO SUPPORT THE FEE AWARD

A Rule 11 motion which is itself frivolous or which contains an excessive fee request not proportional to conduct deemed violative is sanctionable. In any event, in assessing sanctions on such a motion the court must indicate how and what is proportional to the abuse committed. *Insurance Benefits Admin'rs, Inc. v. Martin*, (C.A. 7th, 1989), 871 F.2d 1354.

The failure to specify time and services in itself justifies sanction denial. In *Brown v. Fed. St. Med, Bds. of U.S.*, 839 F. 2D 1142, 1149 (7th Cir. 1992), the court of appeals required specific reasons for substantial fees and the manner of computation.

This was not done by the trial court in the instant cause nor required on appeal. Reasons were not articulated. *Burda v. M. Eker Co.*, (7th, 1992), 954 F.2d 434. Rule 11 does not permit fee shifting for mere compensation. *U.S. ex rel Leno v. Summit Cons. Co.*, 892 F.2d 788.

VI.

RESPONDENTS FAILED TO SUPPORT THEIR BURDEN ON PRE-FILING INVESTIGATION

The first Report and Recommendation from the magistrate judge presumes that dismissal after receipt of subpoenaed school construction documents is an admission that petitioner (herein sometimes referred to as appellant) knew then and that he knew before that there never had been a basis for plaintiff's claims. The more plausible inference is that he expected that the documents did show that Honeywell contributed $65,000.00 in controls for the wholly automated contributing internal environment of the school.

On appeal the court refused to consider an offer of pictures, on site reports and documentation from school district records to show that there was more than enough evidence to show that Honeywell designed and supplied the HVAC system. What was cited from the common law record and submitted from on site inspections demonstrates that inferences based on a voluntary dismissal cannot stand as a basis for sanction.

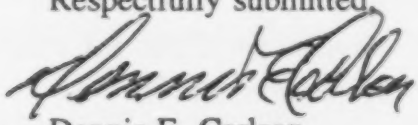
There is no admissible evidence in the record that rat poison brought to the plaintiff's school on routine pesticide applications was never ever used. The inference is that if rat

poison is brought to a school where food is served that it is likely or at least possible that it was used where admittedly made available for such use according to pre-filing admissions attached to each and every complaint filed by plaintiffs and petitioner.

The 1000 pages of transcript submitted by Honeywell show that plaintiff had knowledge of the Honeywell controlled HVAC system failure which consequently retained poison contamination in the school where her toxic systems arose and persisted at all times when deposed in seven sessions. That a trier of fact may ultimately believe a claimed unwritten policy of Anderson against the use of rat poison Talon G does not mean that plaintiff and petitioner had no reason to believe otherwise.

IN CONCLUSION, petitioner prays that this court reverse the judgment for $147,000.00 and remand this cause for hearing on petitioner's sanction motions.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 28, *19* 95.

Honorable JESSE E. ESCHBACH, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 94-1687 and 94-2593

KRISTINA K. LORENTZEN and ALAN LORENTZEN	**] Appeal from the United] States District Court**
Plaintiffs,	**]for the Northern District]of Illinois, Eastern**
v.	**]Division]**
ICI AMERICAS INC. and HONEYWELL, INC.	**] No. 88 C 7142]**
Defendants-Appellees	**]]George W. Lindberg**
Appeal of DENNIS CARLSON	**]Judge**

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellant, Dennis E. Carlson on September 12, 1995, no judge in active service

has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 94-1687 and 94-2593

KRISTINA K. LORENTZEN
and ALAN LORENTZEN,

Plaintiffs,

v.

ANDERSON PEST CONTROL, KLEAN MASTER,
KANKAKEE INDUSTRIAL SUPPLY COMPANY, *et al.*,

Defendants-Appellees.

APPEAL OF: DENNIS E. CARLSON

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 7142—George W. Lindberg, *Judge.*

ARGUED JUNE 6, 1995—DECIDED AUGUST 28, 1995

Before ESCHBACH, KANNE, and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* The district court sanctioned Dennis Carlson, plaintiffs' attorney in the underlying action, for failing to conduct a proper pre-filing investigation and for continuing to pursue baseless litigation against Honeywell, Inc. ("Honeywell") and ICI Americas, Inc. ("ICI") after discovery revealed that they were not proper parties to the action. The district court declined to sanction ICI and Honeywell for allegedly filing a baseless joint

Rule 54(b) motion and for allegedly making misrepresentations to the court. We affirm the rulings of the district court because Carlson waived his right to appeal the imposition of sanctions when he failed to properly object to the magistrate-judge's Report and Recommendation, and because the district court did not abuse its discretion in setting the amount of the sanction or in refusing to sanction ICI and Honeywell.

I. BACKGROUND

Carlson represented Kristina and Alan Lorentzen in a lawsuit against, among others, Honeywell and ICI.[1] The Lorentzens alleged that Kristina had developed multiple chemical sensitivities after being exposed to certain chemicals in two poorly ventilated schools where she taught in suburban Chicago.[2] The Lorentzens named ICI as a defendant because ICI manufactures a rodenticide called Talon-G, which the Lorentzens alleged contributed to Kristina's injuries. Honeywell, the Lorentzens alleged, designed and provided components for the ventilating system of one of the schools. The Lorentzens also named as a defendant Anderson Pest Control ("Anderson"), which allegedly applied the offending chemical substances in the relevant schools.

Through requests to admit directed to Anderson, ICI was quickly able to discern that Talon-G had never been applied in any school where Kristina Lorentzen taught. Carlson himself admitted that neither he nor his client ever had specific knowledge as to what substances had been applied in the schools. Rather, he determined that Talon-G was one of the substances that Anderson had *available* for use in the school district. Faced with the

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[1] The complaint was initially dismissed pursuant to Fed. R. Civ. P. 4(j) for failure to serve process within 120 days. The complaint was refiled approximately one year later, and subsequently amended. This latest version is the subject of this appeal.

[2] Alan Lorentzen's claim was for loss of consortium.

sworn statements of Anderson that Talon-G had not been applied, Carlson refused to immediately dismiss ICI from the case, instead subjecting it to two years of needless discovery before voluntarily dismissing the company from the case.

The circumstances with Honeywell were not much different. Carlson relied entirely on his client's assertion that Honeywell was responsible for ventilation problems at one of the schools without conducting any independent investigation. Instead, Carlson relied on discovery to ascertain whether Honeywell properly belonged in the suit. When pressed to produce information and documents tying Honeywell to any alleged ventilation problems at the school, Carlson finally admitted that he had only recently reviewed construction records for the school and that he had no evidence to keep Honeywell in the case. After Honeywell had expended considerable resources defending itself against the baseless charges, Carlson voluntarily dismissed the company from the case.

Both ICI and Honeywell asked the court to sanction Carlson pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. They maintained that Carlson had failed to conduct an adequate pre-filing investigation and then had continued to pursue the baseless litigation in the face of clear evidence that neither Honeywell nor ICI had injured his clients. After the motions were fully briefed, the district court referred them to a magistrate-judge. On March 28, 1991, the magistrate-judge issued a detailed Report and Recommendation, recommending that the motions for sanctions pursuant to Rule 11 and 28 U.S.C. § 1927 be granted. The magistrate-judge found that costs and attorney's fees would be an appropriate sanction against Carlson, and that he not be allowed to recoup the sanction from his clients. The Report and Recommendation explained that written objections, if any, were to be filed with the district court within ten days, pursuant to Fed. R. Civ. P. 72(b), and that failure to object would constitute a waiver of objection on appeal.

Instead of filing objections with the district court, Carlson filed a motion with the magistrate-judge to vacate the Report and Recommendation. The magistrate-judge denied the motion to vacate, and six weeks later, Carlson filed a "Motion for a Ruling" in the district court, which was also denied. After adopting the Report and Recommendation without objection, the district court ordered ICI and Honeywell to file fee petitions. Carlson was given an opportunity to respond to these fee petitions, but focused his argument on the order imposing sanctions rather than on the amount of the fee requested. The magistrate-judge recommended that the petitions of ICI and Honeywell be granted in their entirety, explaining that in light of the amount of time necessary to defend against the baseless charges, the fees sought were reasonable. The magistrate-judge also determined that nothing less than a substantial monetary sanction would deter Carlson from similar conduct in the future.

This time, Carlson filed an objection to the Report and Recommendation with the district court. On March 3, 1993, the district court adopted the second Report and Recommendation, ordering Carlson to pay $74,499.61 to ICI and $71,420.70 to Honeywell. Carlson filed a motion to vacate that order, but after briefing and argument, the district court denied his motion. Shortly thereafter, seeking to confirm the entry of final judgement, both ICI and Honeywell filed motions for final judgment pursuant to Fed. R. Civ. P. 54(b). The district court denied these motions, and Carlson then filed his own motion for Rule 11 sanctions, arguing that the Rule 54 motions of ICI and Honeywell were baseless. After briefing and argument, the district court denied Carlson's motion for sanctions. Undeterred, Carlson filed a second motion for sanctions, this time contending that ICI and Honeywell had made false statements during the oral argument on Carlson's earlier motion for sanctions. The district court denied this motion pursuant to Local General Rule 12(I), which allows the court to dismiss motions *sua sponte* for failure to prosecute. In this appeal, Carlson challenges the order impos-

ing sanctions against him, as well as the orders denying sanctions against ICI and Honeywell.

II. DISCUSSION

Failure to file objections with the district court to a magistrate's report and recommendation waives the right to appeal all issues addressed in the recommendation, both factual and legal. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990). In *Egert*, the same magistrate-judge had issued the same warning she issued here: that written objections to any finding of fact, conclusion of law or recommendation must be filed with the district court within ten days or such objections will be waived on appeal. We held that the failure of the defendant to heed that warning constituted a waiver of the defendant's right to have this court review the magistrate's findings, and we therefore declined to do so. *Id.* Because Carlson failed to object before the district court to the magistrate-judge's recommendation that sanctions be imposed, we will not review the district court's decision to adopt that recommendation and to sanction Carlson. Furthermore, the district court imposed its sanction under both Rule 11 and 28 U.S.C. § 1927 and Carlson failed to challenge the imposition of sanctions under section 1927. Thus, the section 1927 award supplies an additional, independent basis for upholding the decision of the district court. We affirm, therefore, the imposition of sanctions against Carlson.

Carlson did timely object to the second Report and Recommendation which addressed the amount of sanctions to be imposed, and therefore preserved that issue for review by this court. We review the district court's order setting sanctions for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). "Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found." *Durr*

v. Intercounty Title C. of Illinois, 14 F.3d 1183, 1187 (7th Cir. 1994) (quoting *Harrington v. DeVito*, 656 F.2d 264, 269 (7th Cir. 1981)). Rule 11 permits an award of those expenses directly caused by a baseless filing, including attorneys' fees in defending against the filing. *Id.*

The magistrate-judge's Report and Recommendation, fully adopted by the district court, reflects careful consideration of the detailed billing records submitted by ICI and Honeywell. Having supervised the discovery that accounted for the bulk of the fees in question, the magistrate-judge was in the best position to know whether the fees sought were reasonable. Based on her experience with the litigation, she held that the fees were reasonable and that only a substantial monetary sanction would deter Carlson from engaging in similar conduct in the future. This court's review of the record reveals that the holdings of the district court are well founded in fact and law.

Against this background, Carlson offers nearly unintelligible statements regarding the legal standards for setting fees. While some of these assertions may be correct statements of the law in the abstract, Carlson does not apply them to the facts before us. Carlson offers no specific examples of excessive fees or vague billing records. In fact, he makes no cogent argument at all. The district court did not abuse its discretion in setting the amount of the sanction equal to the fees and costs reasonably incurred by ICI and Honeywell in defending this baseless action. We therefore affirm the amount of the sanctions imposed upon Carlson.

Similarly, the district court did not abuse its discretion in denying Carlson's motions for sanctions against ICI and Honeywell for filing the joint Rule 54(b) motion and for allegedly making misrepresentations in open court. The district court denied the motion seeking sanctions for the alleged misrepresentation for failure to prosecute the motion. Local General Rule 12(I) provides that where a moving party delivers a motion for which no date of presentment is set and fails to serve notice of presentment within

ten days of delivering the copy of the motion to the court, the court may on its own initiative deny the motion. That is exactly what happened here. Carlson argues that he failed to notice up the motion because he did not have a transcript of the hearing where the alleged misrepresentations were made. But Carlson's apparent inability to obtain a transcript has no bearing on his ability to notice up the motion. The court was well within its discretion to dismiss the motion for failure to prosecute.

Moreover, the court was within its discretion when it denied the motion for sanctions for filing the allegedly baseless Rule 54(b) motions. In what had become a case unto itself involving sanctions and attorney's fees, the joint Rule 54(b) motion was made for the proper purpose of putting an end to the baseless litigation, and not to harass, delay or cause unnecessary expense. Indeed, the record reveals that ICI and Honeywell were more than anxious to put an end to the litigation and at no time sought to needlessly protract it. Therefore, the district court did not abuse its discretion in refusing to impose sanctions on the basis of the joint Rule 54(b) motion. We affirm the district court's rulings denying sanctions against ICI and Honeywell.

III. RULE 38 SANCTIONS

Unfortunately, our affirmance does not conclude this sorry proceeding, and there is one more issue we must address. Both ICI and Honeywell have moved on appeal for sanctions against Carlson pursuant to Fed. R. App. P. 38. The imposition of sanctions pursuant to Rule 38 involves a two-step inquiry. First we must decide whether the appeal is, in fact, frivolous. If so, we must determine whether sanctions are appropriate in this case. *Perry v. Pogemiller*, 16 F.3d 138, 189 (7th Cir. 1993). An appeal is frivolous " 'when the result is obvious or when the appellant's arguments are wholly without merit.' " *Ashkin v. Time Warner Cable Corp.*, 52 F.3d 140, 146 (7th Cir. 1995) (quoting *Flaherty v. Gas Research Inst.*, 31 F.3d

451, 459 (7th Cir. 1994)). We at times have also required some evidence of bad faith before finding that sanctions should be imposed. *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 459 (7th Cir. 1994).

Carlson's appeal borders on the frivolous. He presents no argument sufficient to overcome the difficult abuse of discretion standard which applied in this case. Moreover, the defendants faced a daunting and unenviable challenge in responding to Carlson's rambling fifty page brief in which some cognizable argument may have lurked. Nevertheless, we think Carlson did not appeal in bad faith; his judgment was simply poor. We do not condone the slipshod manner in which he has litigated this case, including this appeal. But given the severity of the sanctions imposed below, no useful purpose would be served in further sanctioning Carlson. We therefore exercise our discretion not to impose further sanctions, and the motions for sanctions pursuant to Rule 38 are denied.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—8-28-95

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KRISTINA KRUSE LORENTZEN and ALAN LORENTZEN, Plaintiffs,	)	
v.	)	No. 87 C 7275
HONEYWELL HEATING, a division of MINNESOTA, MINING and MANUFACTURING, a Minnesota Corp., et al., Defendants.	)	

REPORT AND RECOMMENDATION
of Magistrate Elaine E. Bucklo

Plaintiffs Kristina and Alan Lorentzen filed this diversity motion on August 18, 1987. The action alleges that Kristina suffered personal injuries while teaching at Neubert Elementary School in Algonquin, Illinois due to chemicals used by an exterminating company and improper installation of a heating and ventilating system. The caption of the complaint names Tessendorf Constructors and Tessendorf Service Corporation as two of the defendants. Notably, they are not named in the body of the complaint although relief is sought against them and it may be assumed from paragraph 5 of the complaint that they are charged with having some part in the design, installation or maintenance of the school ventilating system.

The named Tessendorf corporations were apparently not the Tessendorf corporation that did work at Neubert School. Their lawyer, upon learning of the lawsuit after a newspaper reporter contacted the defendants, called plaintiff's attorney Dennis Carlson and informed him he had the wrong party. Carlson offered to dismiss the case against the Tessendorf corporation if their lawyer would send a letter stating what he had said in writing. The Tessendorfs' lawyer, Boyd Gates, refused this offer. Instead he filed a motion for sanctions under Rule 11 Fed.R.Civ.P., on August 24, 1987. The motion was supported by an affidavit.

At the initial hearing on the motion, plaintiffs voluntarily dismissed the case against the named Tessendorf defendants. Defendants refused to withdraw their motion for sanctions, however. That motion was referred to me. I held a hearing on the motion on December 9, 1987.

The two Tessendorf corporations sued by the plaintiffs are owned at least in part by the same person, Ronald Tessendorf. The actual Tessendorf corporation that performed work at Neubert School is owned by another member of the Tessendorf family but the corporations are unrelated. All of these various Tessendorf corporations are located in the same general area.

Plaintiffs had made an attempt to learn the identity of defendants. Kristina Lorentzen was told by the school janitor that Tessendorf Constructors had worked on the ventilating system at the school. She thereafter wrote a leter (sic) to Tessendorf Constructors, on June 11, 1987, stating her belief that the company had done work at Neubert School and demanding copies of its maintenance and repair records for the school. The company did not respond to plaintiff's letter

and did not inform her that it had not done work at the school. Instead, believing she was a "crack-pot," according to Mr. Boyd, the company forwarded the letter to Tessendorf Mechanical Industries, the actual corporation that worked at the school.

Kristina also attempted prior to the institution of this suit to obtain relevant records from Neubert School. She was refused access to these records by letter dated July 10, 1987.

Defendants say plaintiffs or their attorney could have done more. They point out that plaintiff's letter to Tessendorf Constructors was not particularly polite and assumed (rather than asked) that the company had done work at the school. Nevertheless, the company did not inform plaintiff of the correct name of the corporation involved although it knew she had incorrect information and surely knew that it would be relatively easy to make a mistake of this nature with three or four corporations with similar names located in the same area.

Under the circumstances, I do not think plaintiffs violated Rule 11 with respect to Tesssendorf Constructors. Rule 11 requires "some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances." Michigan national Bank v. Krozer Company, 629 F.Supp. 1149 (E.D. Mich. 1985). It does not, however, make either litigants or their attorney guarantors of the correctness of their allegations. Here, some inquiry was made, defendants are partly to blame for the mistake, and plaintiffs were unsuccessful in their efforts to learn more. In addition, as soon as they learned their mistake, they corrected

it. They offered to do so without defendants' attorney ever having to come to court if he would simply confirm what he said over the telephone in writing.

These reasons do not provide a justification for naming Tessendorf Service Corp. as a defendant. Plaintiffs say they learned Ronald Tessendorf was a corporate official of both Tessendorf corporations named in the complaint and sued both to avoid statute of limitations problems if the wrong one was sued. That is not enough reason for suit against Tessendorf Service Corp. but since defendants have not attempted to separate the two defendants, I see no reason to do so. In addition, there is authority to support plaintiffs' argument that Rule 11 was not intended to punish a mistake that is quickly corrected. As in Baransky v. Serhant, 106 F.R.D. 247 (N.D. Ill. 1985), I agree that sanctions should not be imposed where plaintiffs acted so quickly to correct their error and defendant's attorney refused unreasonably to provide plaintiffs' attorney with a simple statement in writing prior to filing their motion.

Defendant's real complaint, and the reason their attorney did not comply with Mr. Carlson's reasonable request to send a letter, is that a local newspaper published a story about the filing of the lawsuit and the story named the Tessendorf corporations as defendants. If plaintiffs or Carlson talked to the newspaper and said anything defamatory, they of course can be sued for defamation. Defendants cannot recover under Rule 11, however, for liable or slander in a newspaper article and the fact that the newspaper reported the

allegations of the complaint does not change this fact.[1/]

I recommend that the motion for sanctions be denied.

"s/Elaine E. Bucklo"
ELAINE E. BUCKLO
United States Magistrate

Dated: January 4, 1988

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable Brian Barnette Duff within ten(10) days after service of this Report and Recommendation. See Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

Copies have been mailed to:

DENNIS E. CARLSON
330 West Washington Street
Suite 708
Chicago, IL 60606
Attorneys for Plaintiffs

BOYD L. GATES
25 North Western Avenue
Carpentersville, IL 60110

Attorneys for Defendants

[1/] The newspaper may have made an assumption from the complaint. As noted earlier, the complaint itself does not actually say what the Tessendorf corporations allegedly did. As such, it was poor pleading but less damaging to the defendants.

APPENDIX C

Minute order form (rev.3/88e)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Assigned Judge Brian Barnette Duff
Case Number 88 C 7142 Date July 13, 1989

Case Kristina Kruse Lorentzen v. Anderson Pest Control
Title

DOCKET ENTRY:

(1) ____ Judgment is entered as follows :
(2) √ [Other docket entry],

Plaintiffs' motion to spread or record plaintiffs' contentions in opposition to Anderson's motion to strike, etc., is stricken, without prejudice, for the reasons stated in open court. Defendant Anderson Pest Control's oral motion to dismiss it for want of prosecution is granted. Plaintiff's oral motion to dismiss Honeywell, Incorporated is granted. Defendants given to July 17, 1989 to file memorandum in support of the joint motion to dismiss.

5 √ Answer brief to motion due 14 Aug 89
Reply to answer brief due 28 Aug 89

12 √ No notices required

RECEIVED FOR DOCKETING 89 JUL 14 AM 7:55
Document # 273

Minute order form (rev.3/88e)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Assigned Judge Brian Barnette Duff
Case Number 88 C 7142 Date July 27, 1989

Case Kristina Kruse Lorentzen and Alan Lorentzen v.
Title Anderson Pest Control, et al.

MOTION:
(a) ICI Americas Inc.
(b) Motion to Enter Stipulation to Dismiss

DOCKET ENTRY:

(1) ____ Judgment is entered as follows :
(2) √ [Other docket entry]

Pursuant to stipulation, defendant ICI Americas Inc., is dismissed, with prejudice, pursuant to Rule 41(a)(2)

12 √ Docketing to mail notices

RECEIVED FOR DOCKETING 89 JUL 28 AM 8:05

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KRISTINA KRUSE LORENTZEN and ALAN LORENTZEN, Plaintiffs,	)	
v.	)	No. 89 C 7142
ANDERSON PEST CONTROL, et al., Defendants.	)	JUDGE GEORGE W. LINDBERG

MEMORANDUM OPINION AND ORDER

Plaintiffs have recently filed two motions and five objections to orders and reports and recommendations of the magistrate in this case. In addition, there are several motions for summary judgment and motions for sanctions pursuant to Federal Rule of Civil Procedure 11 pending. The court will now rule on the recent motions and objections and on the motions for summary judgment.

The motions and objections pending may be broken down into four categories for purposes of discussion. First, there are those motions and objections relating to the magistrate's recommendation that the court dismiss this case with prejudice. Those motions and objections are plaintiffs' (1) objections to the September 14, 1990, report and recommendation of the magistrate that this case be dismissed; (2) motions filed October 15, 1990, for leave to file a reply

to defendant's response to plaintiff's objections to the report and recommendation of the magistrate of September 14, 1990; (3) motion filed September 21, 1990, "to file a response to defendant HYSAN's Motion to Dismiss and to file a response and/or objections to magistrate Bucklo's recommendation thereon;" and (4) objections to the magistrate's order of September 18, 1990. Second, there are the motions for summary judgment. Third, there are those objections pertaining to orders of the magistrate regarding fees of various sorts. Those objections are plaintiff's (1) objections to the September 14, 1990, order of the magistrate reducing the fees to be paid to experts retained by defendants; (2) objections to the magistrate's order of September 17, 1990, regarding witness fees; and (3) objections to the magistrate's decision of October 9, 1990, regarding fees. Fourth, there are the motions for sanctions pursuant to Rule 11. FRCP11. These categories will be discussed in turn.

The first category of pending motions and objections concern the magistrate's recommendation that this case be dismissed. The two motions will be considered first.

The first of these motions request that this court "grant leave to file a response to defendant HYSAN's Motion to Dismiss and to file a response and/or objections to Magistrate Bucklo's recommendation thereon for the reason that matters were argued that were not contained in the motion ruled on, the motion was not received until the Friday before the Monday hearing held thereon, and the Magistrate's opinion contains erroneous and /or unfounded conclusions." To the extent that the motion requests leave to file a response to the motion to dismiss, it was properly within the scope of the referral of the motion to dismiss to the magistrate and

belonged before her. Apparently this motion or a similar motion was brought before the magistrate, and her report and recommendation of September 18, 1990, contains her ruling on it. Leave will not be granted to file a response to the magistrate's recommendation of dismissal. The proper procedure is to make objections to the report and recommendation of the magistrate. 28 U.S.C. § 636(b)(1)(B); FRCP 72(b). Plaintiffs filed their Objections and Arguments in Response to Magistrate's Recommendation to Dismiss on September 24, 1990,

[page 2]

[T]here is no basis for the claim beyond the magistrate's ordering of new affidavits, which need not have been done due to a belief that she was being lied to in the first ones. Also, plaintiffs offer no legally sufficient reason for striking all defendants' motions for false statements of fact made by fewer than all of them. The magistrate was obviously unpersuaded by this argument, as she did not strike the motions of any defendants or mention in her order that she believed they had lied.

Finally, a great deal of the argument made by plaintiffs is directed, both specifically and generally, at claimed defects in the affidavits submitted by defense counsel. As plaintiffs have not supplied copies of those documents, it is impossible for the court to ascertain the accuracy of plaintiff's claims.

Plaintiffs have therefore failed to establish that the magistrate's order of October 9, 1990, was clearly erroneous or contrary to law. Their objections to that order will be overruled.

The fourth and final category of motion to be resolved by this opinion are the pending motions for sanctions pursuant to rule 11 of the Federal Rules of Civil Procedure. FRCP 11. This category brings to the attention of the court a potentially broader problem. Because of the procedural chaos of this case, it is difficult to ascertain exactly what motions remain pending.

The court will therefore order all parties who have pending motions, whether or not referred to the magistrate, to file status reports on their pending motions. This will apply to all pending motions, whether or not they are motions for sanctions. The status reports will identify the nature of the motion; when it was filed; what, if any, memoranda were filed in support of or opposition to the motion; and when it was fully briefed and ready for a decision. If there are any unresolved objections to magistrate's

[page 31]

orders or reports and recommendations, they should be treated like motions for the purposes of these status reports. Any motion or objection which is not listed cn a status report filed by the due date shall be deemed abandoned and will be subject to being dismissed for want of prosecution. After the due date for the receipt of the status reports the court will determine which, if any, of the motions to refer to the magistrate.

ORDERED: Plaintiff's motion filed September 21, 1990 is denied. Plaintiff's motion filed October 15, 1990, for leave to file a reply to defendants' response to the objections to the magistrate's recommendations to dismiss is denied.

The magistrate's recommendations of September 14, 1990, regarding dismissal of this action are accepted in whole, defendant Hysan's motion to dismiss joined in by the other defendants is granted, and this case is dismissed with prejudice.

The objections to the magistrate's order of September 18, 1990 are overruled.

All pending motions for summary judgment are denied as moot.

Plaintiff's objections to the September 14, 1990, order of the magistrate reducing the fees to be paid to experts retained by defendants are overruled.

Plaintiff's objections to the September 17, 1990, order of the magistrate granting in part defendant's motion to reconsider her order of July 3, 1990, respecting expert fees are overruled.

The motion for leave to file pleadings responsive to the magistrate's order of October 9, 1990, is denied. Plaintiff's objections to the magistrate's order of October 9, 1990, determining the amount of the sanction to be imposed for plaintiffs violation of the court's order of February 5, 1990, are overruled.

All parties who have pending motions, whether or not referred to the magistrate, shall file status reports on their pending motions on or before January 15, 1991. The

status reports shall identify the nature of the motion; when it was filed; what, if any, memoranda were filed in support of or opposition to the motion; and when it was fully briefed and ready for a decision. If there are any unresolved objections to magistrate's orders or reports and recommendations, they shall be treated like motions for purposes of these status reports. Any motion or objection which is not listed on a status report filed by the due date shall be deemed abandoned and will be subject to being dismissed for want of prosecution.

"s/George W. Lindberg"
George W. Lindberg
United States District Judge

Date Dec 13 1990

Minute order form (rev.3/88e)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Assigned Judge Judge Lindberg
Case Number 88 C 7142 Date December 13, 1990

Case Kristina Kruse Lorentzen and Alan Lorentzen v.
Title Anderson Pest Control, et al.

MOTION:
(a) ICI Americas Inc.
(b) Motion to Enter Stipulation to Dismiss

DOCKET ENTRY:

(1) _x_ Judgment is entered as follows :
(2) ____ [Other docket entry]

Enter Memorandum Opinion and Order: Defendant Hysan's motion to dismiss joined in by other defendants is granted, and case is hereby dismissed with prejudice. See opinion for further rulings on other pending matters. All parties who have additional pending motions shall file a status report on or before January 15, 1991 any motions or objections not listed shall be deemed abandoned and subject to dismissal for want of prosecution.

12 _x_ Docketing to mail notices
_x_ mail AO 450 form

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

KRISTINA KRUSE LORENTZEN and ALAN LORENTZEN, Plaintiffs,	)	
v.	)	No. 89 C 7142
ANDERSON PEST CONTROL, et al., Defendants.	)	

REPORT AND RECOMMENDATION

Kristina Kruse Lorentzen and Alan Lorentzen filed suit against Anderson Pest Control, Whitmire Research Laboratories, Inc., The Dow Chemical Co., Nor-Am Chemical, Inc., ICI Americas, Master, Pennwalt Corporation, Hysan Corporation, Bell Laboratories, Inc. and Tessendorf Mechanical Industries, Inc. seeking damages for physical injuries Mrs. Lorentzen allegedly suffered when she was exposed to certain chemicals at two schools in the Chicago Community School District 300 ("district 300") where she taught. Mrs. Lorentzen alleged that this exposure was caused at least in part by an inadequate heating, ventilation and air conditioning system ("H.V.A.C") in the Neubert School.

The original complaint (naming all of the above defendants) was filed on August 18, 1987 as Case No. 87 C 7275. An amended complaint was filed on August 24, 1987

and a second amended complaint was filed on May 8, 1988, which was dismissed by Judge Duff on June 17, 1988, pursuant to Fed.R.Civ.P. 4(j). See *Lorentzen v. Honeywell Heating, Div. of Minnesota Mining & Mfg.*, 120 F.R.D. 681 (N.D. Ill. 1988). The entire proceeding relating to Case No. 87 C 775 will be referred to as *Lorentzen I.*

On August 27, 1988, plaintiffs refiled their claims (which were identical to those in the second amended complaint) and were assigned Case No. 88 C 7142 (*"Lorentzen II"*). Plaintiffs amended that complaint on December 16, 1988. After the amended complaint was filed, extensive discovery commenced. As discovery continued, plaintiffs voluntarily dismissed two defendants, Honeywell, Inc. ("Honeywell") and ICI Americas, Inc. ("ICI"), pursuant to Fed.R.Civ.P. 41(a). Final judgments were entered in favor of ICI and Honeywell on August 10, 1989 and August 3, 1989, respectively. After dismissal, ICI and Honeywell moved for sanctions pursuant to Fed.R.Civ.P. 11 and 28 U.S.C.§ 1927 against plaintiff's attorney, Dennis E. Carlson.[1] Those motions were referred to me and I recommend that they be granted.

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[1] Honeywell also seeks sanctions against plaintiffs conclude, however, that the violations in this case are characterized by Judge Schwarzer, "Sanctions Under the New Federal Rule 11-a Closer Look," 104 F.R.D. 181, 203 "primarily professional dereliction" since plaintiffs cannot be expected to know the requirements of pleading or of Rule 11. Accordingly, I recommend that sanctions be imposed solely on their attorney, Dennis Carlson, and that he not be allowed to seek reimbursement from his clients for these amounts.

Rule 11

A party is subject to Rule 11 sanctions when its pleading, motion or other paper is

> not well grounded in fact [or] warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, [or] it is . . . interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed.R.Civ.P. 11; *In re Ronco, Inc.*, 838 F. 2d 212, 217 (7th Cir. 1988) (brackets in original). The court must employ an objectively reasonable view of the law and facts and if it is not, "the lawyer or party proceeding recklessly must foot the bill." Id.

Both ICI and Honeywell contend that Mr. Carlson failed to conduct a proper pre-filing investigation which would have shown that plaintiffs were without a factual basis to name ICI and Honeywell as defendants. Rule 11 imposes a duty upon attorneys to conduct a reasonable independent investigation before filing suit. *Fred A Smith Lumber Co. v. Edidin* 845 F. 2d 750, 751 (7th Cir. 1988); *Autotech Corp. v. NSD Corp.*, 125 F.R.D. 464, 469 (N.D. Ill. 1989). *See also Brandt v. Schal Associates, Inc.*, 121 F.R.D. 358, 385 (N.D. Ill. 1988) ("In the run-of-the-mill reasonable investigation case, the attorney says, `my client told me x.' At that point the issue becomes whether the attorney performed an adequate pre-filing investigation to determine whether his or her client's story was supported.")

> The purpose of this timing requirement is obvious: counsel should not be permitted - - without reasonable investigation - - to file pleadings, motions, or other papers, and the, only if challenged (and after imposing substantial costs on the opposing party), be allowed to scramble to find facts and law justifying his original filing.

Phoenix Airway Inn Associates v. Essex Financial Services, Inc., 741 F.Supp. 734, 735 (N.D. Ill. 1990). The Seventh Circuit has established several factors which should be considered when assessing the reasonableness of a pre-filing inquiry. These include whether the attorney had sufficient time to investigate the claims; the extent to which the attorney had to rely on the client for the factual foundation of the pleading; whether the case was accepted from another attorney; the complexity of the facts; and whether discovery would have been beneficial to the development of the underlying facts. *Brown v. Federation of State Medical Boards of the United States,* 830 F.2d 1492, 1435 (7th Cir. 1987). The probability that more investigation would turn up important evidence is also a factor to consider. *Lebovitz v. Miller,* supra, 856 F. 2d at 905.

Here, however, Mr. Carlson admits that he relied on the Lorentzens' representations as a factual basis of the complaint, but Mr. Carlson had ample time to investigate before the original filing of *Lorentzen I.* Indeed, between that time and the filing of *Lorentzen II* he could have (and should have) continued his investigation of the claims.

In support of its motion, Honeywell refers to the deposition testimony of Kristina Lorentzen, taken shortly

before her counsel's decision to move for dismissal, in which she admitted that she had no information as to whether Honeywell did anything in regard to the construction of the Neubert School (Dep. June 2 1989, pp. 1795-96).[2]

In response to Honeywell's motion, Mr. Carlson states that he believed prior to filing that some Honeywell product may have been used in the H.V.A.C. system at Neubert School based on the fact that a thermostat in the school bore the Honeywell name.[3] In addition, that Mrs. Lorentzen testified that she attempted to gain as much information under the Freedom of Information Act and form her employer as she was able from potential defendants and District 300.

In any event, the record is devoid of any evidence that Mr. Carlson attempted to substantiate any of the information which Mrs. Lorentzen supplied to him prior to naming Honeywell as a defendant. Yet, the amended complaint

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[2] Mrs Lorentzen was also asked whether any Honeywell component part contributed to her injuries, but her counsel refused to allow her to answer, Dep., June 2, 1989 at 1795. Despite repeated court orders, plaintiffs never answered Honeywell's interrogatories seeking information about the plaintiffs' claim against Honeywell.

[3] Mr. Carlson contends that the only reason he dismissed Honeywell was because the discovery burden was too onerous. I find this contention implausible. Mr. Carlson filed his motion for voluntary dismissal shortly after he received the Neubert School construction records pursuant to his July 5, 1989 subpoena. Notably, he did not seek these records until almost two years after he filed his original complaint naming Honeywell as a defendant.

alleges that Honeywell designed, installed or maintained the H.V.A.C. system and that it was insufficient in properly ventilating chemicals from the school. Mr Carlson relied upon discovery to ferret out whether Honeywell was legitimately involved in this suit. Such conduct is improper. *See Phoenix Airway Inn v. Essex Financial Services, Inc.*, 741 F. Supp. at 736. While Mr. Carlson may have suspected that Honeywell was somehow liable he should have either waited to file the complaint so that could conduct some investigation or filed it without naming Honeywell and, should his hunch have proved right, sought leave to amend the complaint and add Honeywell as a defendant. *Valve & Primer Corp. v. Val-matic Vale & Mfg. Corp.*, No. 87 C 8726, 1990 U.S. Dist. LEXIS 11173 (ND. Ill. 1990).

The pre-filing investigation (or lack thereof) relating to ICI tells a similar story. According to Mr. Carlson, ICI was named as a defendant because one of its chemicals, Talon-G,[4] for use in District 300 buildings and which could have caused some of the symptoms Mrs. Lorentzen was experiencing. Instead of attempting to discover which of those chemicals were in fact used at the schools, Mr. Carlson decided to name all of the manufacturers on the list whose chemicals could create symptoms of a type Mrs. Lorentzen experienced as defendants and see what transpired during discovery.

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[4] The Parties agree that Talon-G was the only product manufactured by ICI at issue here.

Anderson stated in response to discovery requests, that it did not use Talon-G at the Neubert School.[5] Mr. Carlson later admitted that he and his clients had no knowledge of any person having seen the application of Talon-G or other pesticides at the Neubert School.

As with Honeywell, Mr. Carlson could not, consistently with the requirements of Rule 11, name ICI as a defendant on the basis that it might have manufactured a chemical that he thought might have caused Mrs. Lorentzen's symptoms and hope through discovery to find evidence to substantiate the possibility.

I recommend that Honeywell's and ICI's motion be granted and that fees and costs be assessed against Mr. Carlson.

Section 1927

Section 1927 imposes personal liability upon an attorney for unreasonably and vexatiously multiplying proceedings 28 U.S.C. § 1927; *Ordower v. Feldman*, 826 F. 2d 1569, 1574 (7th Cir. 1987);

> If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the

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[5] Instead of moving to dismiss his complaint against ICI following this discovery, plaintiffs' attorney opposed ICI's motion for summary judgment, despite his lack of contrary evidence. He finally voluntarily dismissed his claim against ICI in August of 1989.

> conduct is objectively unreasonable and vexatious. . . A lawyer's reckless indifference to the law may impose substantial costs on the adverse party. Section 1927 permits a court to insist that the attorney bear the cost of his own lack of care.

Id. citing *In re TCI, Ltd.*, 769 F. 2d 441, 445 (7th Cir. 1985).

By failing to conduct any pre-filing investigation, Mr. Carlson acted unreasonably and vexatiously and violated Section 1927. Mr. Carlson is therefore liable for ICI"s and Honeywell's attorneys' fees and costs incurred in *Lorentzen I* and *Lorentzen II*.

Conclusion

Accordingly, I recommend that Honeywell's and ICI's motions for sanctions against attorney Dennis Carlson pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § be granted.

"s/Elaine E. Bucklo
Elaine E. Bucklo
United States Magistrate Judge

Dated: March 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KRISTINA KRUSE LORENTZEN and ALAN LORENTZEN, Plaintiffs,	)	
v.	)	No. 89 C 7142
ANDERSON PEST CONTROL, et al., Defendants.	)	

REPORT AND RECOMMENDATION

In an order dated October 17, 1991, the district court granted motions by ICI Americas, Inc. ("ICI") and Honeywell, Inc. ("Honeywell") seeking sanctions against attorney Dennis Carlson pursuant to Rule 11, Fed.R.Civ.P. and 28 U.S.C. § 1927. ICI has filed a petition seeking $65,278.75 in fees and $9,220.86 in costs for a total of $74,499.61 in fees and costs. Honeywell's petition seeks $63,197.50 in fees and $8,223.20 for a total of $71,420.70.

I presided over discovery in this case and am aware of the amount of time required to be spent by attorneys in the case. With respect to that time, the fees sought are reasonable.

Attorney Carlson makes only a perfunctory objection that the amount of fees sought is unreasonable,[1] and indeed notes that his own (or his clients') costs in the Litigation were

between $50,000 and $60,000. He argues that fees should not be imposed because the underlying conduct was not sanctionable but that issue has been decided against him. He also argues that the amount requested exceeds his income for 1990, that "at this time he has no funds to pay any sanction" and that a sanction in the amount requested would impose a hardship on him. ICI and Honeywell note, however, that Mr. Carlson does not disclose his income for 1991 or 1989, or his assets. The Seventh Circuit has stated, in another case in which it upheld a sanction against similar arguments, that hardship "is the intent behind a sanction award imposed to deter and punish. A sanction without teeth may lack sufficient bite for these purposes." *Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc.*, 886 F. 2d 1485, 1496 (7th Cir. 1989).

Mr. Carlson's conduct in the present case violated Rule 11 and Section 1927 to the damage of ICI and Honeywell, who were required to engage counsel, and defend the baseless claims brought against them. Based on my experience in overseeing discovery in this litigation, I do not think anything less than a substantial monetary sanction will deter Mr.

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[1] His argument that the billing records are "cryptic," if meant to imply that they provide insufficient information, is without foundation. I have reviewed the billing records and they are sufficiently detailed. If counsel was unclear about particular entities should have pointed those out, or asked for further detail.

Carlson from similar conduct in the future. Accordingly, I recommend that ICI's petition for fees and costs in the amount of $74, 499.61 and Honeywell's petition for fees and costs in the amount of $71,420.70 be granted.

"s/Elaine E. Bucklo"
Elaine E. Bucklo
Unites States Magistrate Judge

Dated; July 10, 1992.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KRISTINA KRUSE LORENTZEN and ALAN LORENTZEN,	)	
Plaintiffs,	)	
v.	)	No. 89 C 7142
ANDERSON PEST CONTROL, et al.,	)	
Defendants.	)	

ORDER

Plaintiffs' motion to vacate or reconsider my report and recommendation of March is denied. "Plaintiffs" (in fact their attorney, Dennis Carlson, since I recommended sanctions only against him) argue that they had no opportunity to respond to the motions. That is patently false. The motions were brought in 1989 by ICI America and Honeywell. Plaintiffs in fact responded.[1] Furthermore, the motions were referred to me on January 24, 1991. At a status on February 21, 1991, I told Mr. Carlson that I would

[1] Plaintiffs filed a 15-page response to the Honeywell motion on October 11, 1989. On November 11, 1989, Judge Duff ordered plaintiffs to respond to ICI's motion by November 24, 1989. Plaintiffs' response was filed on that date.

not be able to rule on the motions for several weeks and stated that if he wanted to and could show good cause why he should be allowed to file any additional response to the motions, I would consider any additional material.

Mr. Carlson never sought to file an additional response prior to my decision on March 28, 1991. Mr. Carlson's statements in his present motion that his previous responses were simply "'something'" to "have on file if the court should be inclined to consider the pending motions" and that he believed he could at some future time file an additional pleading thus fly in the face of the pleadings on this motion, Judge Lindberg's January 24, 1991 order, the status hearing before me on February 21, 1991, and Rule 11, Fed.R.Civ.P.

Mr. Carlson's additional arguments are also without merit. As Mr. Carlson knows, the March 28, 1991 "order" was a report and recommendation. As I told him in open court on March 22, 1991, in response to his objection, in order to alleviate any possible jurisdictional issue, I would issue all opinions on sanctions in this case as reports and recommendations. His renewed objection is therefore frivolous. His last objection, that the has a right to an evidentiary hearing, is foreclosed first, by the fact that in his responses, he did not request an evidentiary hearing, and second, by the fact that my recommendation of sanctions is based on Mr. Carlson's failure to submit any evidence in response to the motions for sanctions that would show that he made an objectively reasonable investigation of the facts before filing his complaints against Honeywell and ICI, and admissions in the record by Mr. Carlson and plaintiff Kristina Lorentzen, which I conclude demonstrates as a matter of law that they lacked a sufficient basis for filing the complaint against either ICI or Honeywell. Since I did not make

findings of any disputed facts, and based, as I must, my decision that Mr. Carlson violated Rule 11 on an objective standard, there was no need for an evidentiary hearing. Furthermore, Mr. Carlson could not sit back and decline to offer any evidence to show he made an objectively reasonable investigation and then demand an evidentiary hearing, presumably to attempt to show that he did make such an investigation, after a recommendation of sanctions is made.

ENTER ORDER

"s/Elaine E. Bucklo"
ELAINE E. BUCKLO
United States magistrate Judge

Dated: April 9, 1991

APPENDIX G

Minute order form (rev.3/88e)

NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Assigned Judge JUDGE LINDBURG
Case Number 88 C 7142 Date October 17, 1991

Case Kristina Kruse Lorentzen and Alan Lorentzen v.
Title Anderson Pest Control, et al.

MOTION:
Defendant Honeywell, Inc. Motion for Sanctions Pursuant to F.R.C.P. 11 and 23 U.S.C. Sec. 1987

DOCKET ENTRY:

(1) _____ Judgment is entered as follows :
(2) _x_ [Other docket entry]

The Court hereby adopts the Magistrate's report and recommendation. Petition for fees to be filed by November 22, 1991. Response due December 6, 1991. Reply due December 13, 1991.

12_x_ Docketing to mail notice
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APPENDIX H

Minute Order Form (rev. 12/90)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,

Assigned Judge GEORGE W. LINDBURG
Case Number 88 C 7142 Date October 7, 1992

Case LORENTZEN ET. AL. V. ANDERSON PEST
Title CONTROL, ET AL.

MOTION:

DOCKET ENTRY:

(1) ____ Judgment is entered as follows :
(2) _x_ [Other docket entry]

Order all pending motions moot

11 x No notices required

October 8, 1992
Document #1110

APPENDIX I

Minute Order Form (rev. 12/90)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,

Assigned Judge George W. Lindberg
Case Number 88 C 7142 Date March 3, 1993
Case Title Lorentzen v. Anderson Pest Control, et al.

MOTION:

Dennis E. Carlson's objections to Magistrate Judge's report and recommendation of July 10, 1992 with respect to the petitions of defendants ICI Americas, inc. (ICI) and Honeywell, Inc. (Honeywell) for awards of attorney's fees and costs.

DOCKET ENTRY:

(1) _____ Judgment is entered as follows :

(2) _x_ [Other docket entry]

The court has reviewed de novo the portions of the magistrate judge's report and recommendation of July 10, 1992 to which plaintiff has objected. 28 USC § 636(b)(1)(B); FRCP 72(b). Plaintiff's objections are overruled and the report and recommendation is accepted in its entirety. ICI's petition for fees and costs is granted and ICI is awarded fees and costs in the amount of $74,499.61. Honeywell's petition for fees and costs is granted and Honeyweil is awarded fees and costs in the amount of $71,420.70.

"s/George W. Lindberg"

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_x_ Docketing to mail notices Document # 1111

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KRISTINA KRUSE LORENTZEN and ALAN LORENTZEN, Plaintiffs,	)	
v.	)	No. 89 C 7142
	)	March 15, 1994
ANDERSON PEST CONTROL, et al., Defendants.	)	11:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GEORGE W. LINDBERG

[pg 26]

THE COURT: Okay. The Court has considered the arguments of counsel, both orally today and in writing, and pursuant to Federal Rules of Civil Procedure 52 and 59. The Court is of the opinion that it had and has jurisdiction over the question of whether to sanction Mr. Carlson. The mooting order in October of 1992 was, as counsel has recognized, a housekeeping order. This clerk's records were at that time indicating in many cases, in fact scores of cases, that

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certain motions were pending which were long since moot.

In order to make this court's records reflect that those motions were no longer pending it was necessary to enter the order mooting them. As the fact that the parties were not notified of the action indicates that order was not intended to have any effect on non-moot pending motions. Thus while counsel for Mr. Carlson is correct that motions for sanctions remain pending after the magistrate judge issued her report and recommendation until this Court ruled on those motions, he is not correct; that the mooting order decision despite its overly broad term, in fact, obliterated those motions.

The Court also does not believe that the stipulations to dismiss ousted this court of jurisdiction over the Rule 11 sanction matters brought against Mr. Carlson. First, Federal Rule of Civil Procedure by its terms only permits the dismissal of an entire action and not of an individual. That would be of Rule 41(a)(2) - - 41(a). First, its terms only permits dismissal of an entire action not of individual defendants or claims.

To do so on stipulation would have required the signatures of all parties. In this case, however, plaintiffs and these defendants were allowed to terminate the claim against these defendants utilizing procedure of rule 41(a).

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The result they sought could have been achieved by an amendment of the complaint eliminating these defendants pursuant to Federal Rule of Civil Procedure 15(a), but that was not done.

This does not mean that these defendants were not dismissed from the case, however, because the Rule 54(b) findings were certainly sufficient to have that effect. It does not mean that nothing of any finality occurred until - - I'm sorry. It does mean that nothing of any finality occurred until those Rule 54(b) findings were made. All of this may not ultimately affect the outcome here.

The stipulations did not contain any language precluding motions of Rule 11 sanctions by the defendants. The law permits the Court to consider Rule 11 sanction matters even after final judgment in a case.

Therefore, the Court concludes that it has jurisdiction over the Rule 11 proceedings against Mr. Carlson. Magistrate Judge Bucklo, Judge Duff, and this judge all had the opportunity to observe Mr. Carlson's handling of the case. At one time or another all three of us experienced the frustration of attempting to get him to comply with our orders. The experience of this judge is sufficient to find that Magistrate judge Bucklo was indeed correct, that no lesser sanction than that imposed would serve the purpose of

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deterring Mr. Carlson from sanctionable conduct similar to that to which the instant sanctions were imposed.

The Court would finally note that Magistrate Judge Bucklo had before her the submissions of defendants with regard to the amount of sanctions to impose. Mr. Carlson at that time had an opportunity to contest any of these defendants' claims for attorney fees and to place before the Court any additional

material helpful to the Court in deciding on the amount of sanctions.

The time has long since passed for evidentiary submissions on the issues of sanctions. Therefore, Dennis Carlson's motion pursuant to Federal Rules of Civil Procedure 52 and 59 and his request that this matter be set for an evidentiary hearing are denied.

These proceedings are concluded. Thank you , gentlemen.

CERTIFICATE

I certify the foregoing is a correct transcript from the record of the proceedings in the above-entitled case taken on March 15, 1994.

"s/ Therese A. Pintozzi
Official Court Reporter

Date

Minute Order Form (rev. 12/90)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,

Assigned Judge George W. Lindberg
Case Number 88 C 7142 Date March 25, 1994

Case Title Lorentzen v. Anderson Pest Control, et al.

MOTION:

DOCKET ENTRY:

(1) ____ Judgment is entered as follows :
(2) x ___ [Other docket entry]

Oral argument held on March 15, 1994 on Dennis Carlson's motion for reconsideration of Rule 11 sanctions against attorneys for Honeywell and ICI Americas pursuant to Rules 52(b) and 59. For reasons sated in open court Dennis Carlson's motion for reconsideration is denied.

11 x Docketing to mail notices

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APPENDIX K

Minute Order Form (rev. 12/90)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,

Assigned Judge George W. Lindberg
Case Number 88 C 7142 Date May 9, 1994

Case Kristina Kruse Lorentzen and Alan Lorentzen v.
Title Anderson Pest Control, et al.

MOTION:

Attorney Dennis E. Carlson's petition for Rule 11 sanctions for misrepresentation of fact on and before March 15, 1994.

DOCKET ENTRY:

(1) _____ Judgment is entered as follows :
(2) _x_ [Other docket entry]

Attorney Dennis E. Carlson's petition for Rule 11 sanctions for misrepresentation of fact on and before March 15, 1994, is denied for failure to prosecute. US Dist CT, ND Ill, GR 12(I)

11 _x_ Docketing to mail notices

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Minute Order Form (rev. 12/90)

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,

Assigned Judge George W. Lindberg
Case Number 88 C 7142 Date June 20 1994

Case Title Lorentzen v. Anderson Pest Control, et al.

MOTION:

Attorney Dennis Carlson's motion to vacate and for ruling on the allegations of his Rule 11 motion pursuant to rule 59.

DOCKET ENTRY:

(1) _____ Judgment is entered as follows :
(2) _x_ [Other docket entry]

Attorney Dennis Carlson's motion to vacate and for ruling on the allegations of his Rule 11 motion pursuant to Rule 59 is denied. The court, sua sponte, strikes the response of defendant ICI Americas, Inc [1157], to attorney Carlson's petition for Rule 11 sanctions because the setting of a briefing schedule is in the court's discretion, US Dist Ct, N D Ill, GR 12(O), and no briefing schedule was ever set by the court on attorney Carlson's petition.

"s/George W. Lindberg"

11 _x_ Docketing to mail notices
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